Supreme Court, U.S.
FILED
JUL 7 1980
MICHAEL RODAK, JR., CLERK

80-24

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CONTINENTAL TRAINING SERVICES, INC.
and GARY EYLER,
Petitioners,

v.

ANTHONY J. VENZARA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN J. DILLON
RICHARD M. MALAD
DILLON HARDAMON & COHEN
120 E. Market St., Suite 511
Indianapolis, IN 46204
(317) 636-6481
Counsel for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTION PRESENTED

After the district court granted the plaintiff's Rule 37(b) motion for sanctions, an order was entered striking the defendants' answers and affirmative defenses, and a judgment by default was imposed upon both defendants. While Continental Training Services, Inc. had admittedly experienced difficulty in complying with the court's discovery order, no discovery was requested of the individual defendant, Gary Eyler, and he was not the subject of any court order. Although the complaint clearly did not seek liquidated damages, no hearing was conducted to assess plaintiff's damages, and the plaintiff was permitted to file sworn proof of his claim and a proposed final judgment form. The district court adopted the plaintiff's proposed judgment, from which the petitioners present two issues for review:

1. Whether a defaulted defendant under Rule 37(b) is entitled to a hearing on the unresolved issue of unliquidated damages.

2. Whether an individual codefendant, who had not failed to comply with any order of the court, was entitled to a trial despite the default of the corporate defendant.

INDEX

	Page
QUESTIONS PRESENTED	i
OPINION BELOW	1
JURISDICTION	2
FEDERAL RULE OF CIVIL PROCEDURE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
1. The Decision Of The Court Of Appeals For The Fifth Circuit Conflicts With The Decisions Of Other Circuits And Decisions Of This Court Regarding The Proper Manner Of Assessing Unliquidated Damages Subsequent To The Entry Of A Judgment By Default	5
2. The Decision Of The Court Of Appeals For The Fifth Circuit Conflicts With The Decisions Of Other Circuits Regarding Whether An Individual Codefendant Is Entitled To A Trial Pursuant To Rule 54(b) Despite The Default Of The Corporate Defendant	11
CONCLUSION	14
APPENDIX	1a

CITATIONS

CASES:

American Coat Pad Company of Baltimore City v. *Phoenix Pad Company* (4th Cir. 1902), 113 F. 629	12, 13
Barber v. *Turberville* (D.C. Cir. 1954), 218 F.2d 34	6
Davis v. *National Mortgage Corp.* (2nd Cir. 1965), 349 F.2d 175	12
E. C. Gerhard Building Co. v. *City of Dallas* (5th Cir. 1924), 298 F. 264	10

PREVIOUS PAGE WAS BLANK

Citations Continued

Page

Eisler v. *Stritzler* (1st Cir. 1976), 535 F.2d 148 6

Flaks v. *Koegel* (2nd Cir. 1974), 504 F.2d 702 8

Frow v. *De La Vega* (1872), 15 Wall. (82 U.S.) 552, 21 L.Ed. 60 13

Geddes v. *United Financial Group* (9th Cir. 1977), 559 F.2d 557 6

Klapprott v. *United States* (1949), 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 6

Nishimatsu Construction Co., Ltd. v. *Houston National Bank* (5th Cir. 1975), 515 F.2d 1200 10

Peitzman v. *City of Illmo* (8th Cir. 1944), 141 F.2d 956 6

Thompson v. *Wooster* (1885), 114 U.S. 104, 5 S.Ct. 788, 29 L.Ed. 105 7

Thorpe v. *National City Bank of Tampa* (5th Cir. 1921), 274 F. 200 10

Trans World Airlines, Inc. v. *Hughes* (2nd Cir. 1971), 449 F.2d 51, *Rev'd on other grounds* (1973), 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 ... 6, 8, 12, 13-14

United States for the Use of Hudson v. *Peerless Insurance Company* (4th Cir. 1967), 374 F.2d 942 .. 12, 13

Williams v. *Corwin* (Hopk.Ch. 471) 7

MISCELLANEOUS:

"Defaulting Defendant's Right To Notice And Hearing As To Determination Of Amount Of Damages", 15 A.L.R. 3d 586 (1967) 11

Rule 10(b), F.R.Civ.P. 12

Rule 18, F.R.Civ.P. 12

Rule 37, F.R.Civ.P. 2

Rule 37(b), F.R.Civ.P. ..... i, 5, 11

Rule 54(b), F.R.Civ.P. 12

Rule 54(c), F.R.Civ.P. 9

10 Wright & Miller, *Federal Practice and Procedure* § 2688 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

CONTINENTAL TRAINING SERVICES, INC.
and GARY EYLER,
Petitioners,

v.

ANTHONY J. VENZARA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, Continental Training Services, Inc. and Gary Eyler, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 7, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not for publication, a per curiam decision pursuant to Local Rule 21, affirmed the district court judgment without issuing any opinion. The order by the District Court for the Southern District of Florida granting Respondent's Motion for Sanctions and Final Judgment appear in the Appendix hereto.

JURISDICTION

The decision of the Court of Appeals for the Fifth Circuit was entered on March 7, 1980. A timely petition for rehearing *en banc* was denied on April 7, 1980, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 37. "Failure to Make Discovery—Sanctions.

(b) Failure to comply with order.

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (2) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;"

STATEMENT OF THE CASE

Continental Training Services, Inc. (Continental Training), operator of a truck driver training school, entered into a contract with Anthony J. Venzara (Venzara) as placement agent to solicit and enroll qualified students for Continental Training's classes. (Tr. 5) Venzara was to receive a commission based upon a specified formula and based upon monies actually received by the school and not subsequently refunded. On or about October 31, 1975, Continental Training executed a promissory note in favor of Venzara for the sum of Ten Thousand Dollars ($10,000.00) which was personally guaranteed by Gary Eyler, President of Continental Training. (Eyler)

On March 15, 1977, Venzara filed this suit seeking alleged unpaid commissions and repayment of the note. (Tr. 1) Continental Training and Eyler each appeared and timely answered the Complaint. Continental Training also sought a set off against Venzara for commissions paid but which were unearned.

The Plaintiff requested various discovery from Continental Training regarding Count I for placement commissions. Continental Training complied with the Plaintiff's Request for Admissions (Tr. 47), responded to Plaintiff's Interrogatories (Tr. 62), then clarified its responses to these interrogatories which the Plaintiff desired clarified (Tr. 85), and was excused by the Court from responding to Plaintiff's Motion to Produce because the documents had been inadvertently destroyed (Tr. 69). The Defendants entered into the Joint Pre-Trial Stipulation with the Plaintiff as ordered by the Court (Tr. 80), and complied with all discovery orders by February 21, 1978, twenty-one (21)

days prior to the trial date. No discovery was requested of Gary Eyler and therefore the district court did not order him to comply with any requested discovery. Yet the district court entered a default judgment against both Defendants merely because Continental Training failed to file an affidavit "explaining the circumstances surrounding the destruction of the Defendant's records, and verifying the allegations contained in Defendants' Motion for Extension of Time and continuance of the trial." (Tr. 91)

On March 22, 1978, the district court entered an order granting the Plaintiff's motion for sanctions. (Tr. 90) The Defendants' answers and affirmative defenses were striken and a default judgment was entered against both Defendants. The Plaintiff was ordered to file sworn proof of his claims and a proposed final judgment. No evidentiary hearing was conducted upon the issue of unliquidated damages. On April 12, 1978, the Plaintiff filed his affidavit summarizing his damages along with the affidavits of two local attorneys on the issue of reasonable attorney fees. (Tr. 103)

On May 30, 1978, the district court entered its Final Judgment against Continental Training on Count I for $44,701.00 principal plus $4,000.00 in attorney fees and on Counts II and III against both Defendants for $15,095.27 principal and interest and $2,000.00 in attorney fees. (Tr. 115)

Defendants' appeal was docketed with the Court of Appeals for the Fifth Circuit on August 4, 1978. Oral argument was heard on January 29, 1980, and on March 7, 1980, the Court of Appeals for the Fifth Circuit affirmed the judgment of the district court without opinion. Defendants' timely request for rehearing en banc was denied on April 7, 1980.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals for the Fifth Circuit Conflicts With the Decisions of Other Circuits and Decisions of This Court Regarding the Proper Manner of Assessing Unliquidated Damages Subsequent to the Entry of a Judgment by Default

Upon a party's failure to comply with a discovery order of a district court, under Rule 37(b), Federal Rules of Civil Procedure, the court may make such orders in regard to the failure as are just. The court's most severe sanction, resulting in the denial of an adversary hearing prior to judicial determination of rights and liabilities, is an order striking out the party's answer and affirmative defenses and rendering a judgment by default against the disobedient party. This petition presents the Court with an opportunity to clarify the proper manner of ascertaining the amount of damages to be awarded upon the entering of a judgment by default for failure to comply with discovery orders.

The District Court for the Southern District of Florida, upon entering a default judgment against the defendants, permitted the plaintiff to submit an affidavit of his damages and a proposed judgment. (Tr. 90) No hearing was conducted by the court, and the defendants were thus unable to cross examine the plaintiff upon his allegation of damages or to offer evidence in contradiction thereto. The Court of Appeals for the Fifth Circuit affirmed the judgment of the district court without an opinion and subsequently denied a rehearing en banc.

This holding is directly contrary to the rulings of the First, Second, Eighth, Ninth and District of Columbia Circuits and of the United States Supreme Court. Each of these courts have determined that, although

the defaulted party may not contest the issue of liability, the amount of unliquidated damages is not admitted. The defaulted party is entitled to a hearing or trial upon this unresolved issue, at which time, it may cross examine the plaintiff and other witnesses and present testimony in response to the plaintiff's allegation of damages. *Eisler* v. *Stritzler* (1st Cir. 1976), 535 F.2d 148; *Trans World Airlines, Inc.* v. *Hughes* (2nd Cir. 1971), 449 F.2d 51, *rev'd on other grounds,* (1973) 409 U.S. 363; *Peitzman* v. *City of Illmo* (8th Cir. 1944), 141 F.2d 956; *Geddes* v. *United Financial Group* (9th Cir. 1977), 559 F.2d 557; *Barber* v. *Turberville* (D.C. Cir. 1954), 218 F.2d 34; and *Klapprott* v. *United States* (1949), 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266. It appears that the Third, Fourth, Sixth and Seventh Circuits have not had an opportunity to rule upon this issue.

The decision of the Court of Appeals for the Fifth Circuit, affirming the district court's assessment of damages upon the plaintiff's affidavit, directly conflicts with each of the above rulings. The remaining circuit courts might follow either the majority view or the Fifth Circuit interpretation as expressed by their approval of this judgment.

Upon entry of the default judgment, it was necessary for the district court to ascertain the amount of the plaintiff's damages. Count II of the plaintiff's complaint is founded upon a promissory note whose balance is easily calculated. However, Count I was for commissions allegedly earned by the plaintiff for finding persons to enroll as students in the defendant's truck driver training program. (Tr. 1) Attached to the complaint was a copy of the contract between Continental Training and Venzara. The contract provides

that the agent, Venzara, shall receive a different rate of commission for enrolling veteran and non-veteran students and shall receive commissions only on monies actually received by the school. (Tr. 7) Moreover, where a student does not complete the program, the agent is required to refund a part of the commission. Thus, the amount of commissions due to the placement agent subsequent to the default judgment against Continental Training was neither liquidated nor a sum certain which could be determined without a hearing. Petitioners herein assert that it was erroneous for the district court to determine the plaintiff's damages solely upon the affidavit of the plaintiff.

"The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the court require an examination of details, the obligation to furnish proofs rests on the complainant." *Thompson* v. *Wooster* (1885), 114 U.S. 104, 5 S.Ct. 788, 792, 29 L.Ed. 105. (citing, *Williams* v. *Corwin,* Hopk.Ch. 471). The entering of a default judgment relieves the plaintiff of his obligation to prove that he is entitled to damages, however the plaintiff must still prove in an adversary hearing or trial the amount of damages which he is entitled to recover.

> "Because, however, the damages were unliquidated and uncertain, F.R.Civ.P. 55(b), it was necessary for TWA at the hearing to establish the *extent* of the injuries established by the default. The outer bounds of the recovery allowable are of course measured by the principle of proximate cause. The default judgment did not give TWA a

> blank check to recover from Toolco any losses it had ever suffered from whatever source. It could only recover those damages arising from the acts and injuries pleaded and in this sense it was TWA's burden to show 'proximate cause'." *Trans World Airlines, Inc.* v. *Hughes* (2nd Cir. 1971), 449 F.2d 51, *rev'd on other grounds* (1973), 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577.

In *Flaks* v. *Koegel,* the Court of Appeals for the Second Circuit remanded a similar case back to the district court for an evidentiary hearing to ascertain damages. (2nd Cir. 1974), 504 F.2d 702. As a result of the defendants' failure to fully answer interrogatories and to attend a deposition, the district court struck the defendants' answer and directed the clerk to enter a default judgment in the amount sought in the complaint plus interest. The Second Circuit reversed and remanded the case for an evidentiary hearing to ascertain damages. "While a default judgment constitutes an admission of liability, the quantum of damages remains to be established by proof unless this amount is liquidated or susceptible of mathematical computation." 504 F.2d at 707.

> "As Chief Justice Kaufman indicated in *Dopp* v. *Franklin National Bank,* 461 F.2d 873, 879 (2d Cir. 1972), generally a judge should not resolve factual disputes on affidavits or depositions, for then he is merely showing a preference for 'one piece of paper over another'. . . . As we have previously indicated, due process constitutional considerations underlie Rule 37 dispositions. We consider the failure of the court here to conduct an evidentiary hearing in order to determine the question of defendants' willfulness an abuse of discretion." *Flaks* v. *Koegel,* 504 F.2d at 712.

By the date of the district court's order granting sanctions, Continental Training had substantially complied with all of the discovery orders, and thus the plaintiff had been provided with sufficient information with which to prove his actual damages in an evidentiary hearing. Plaintiff's first set of interrogatories were served on August 8, 1977 and were answered by Continental Training on October 7, 1977. (Tr. 41 and 121) Of the sixteen interrogatories propounded, only three of the responses were unsatisfactory to the plaintiff. On February 21, 1978, Continental Training filed its responses to a second set of interrogatories, which included a list of data concerning approximately 85 students about whom the plaintiff had requested information. (Tr. 85-9) The figures presented in these responses indicated that substantial refunds on commissions paid to the plaintiffs were due to Continental Training. Yet, the district court ignored this sworn evidence and permitted the plaintiff to, in essence, determine its own judgment via a sworn proof of claim.

Although appellants do not believe the issue to be worthy of review before this Court, it is interesting to note that, in determining its own judgment, the plaintiff sought and received damages in excess of the amount prayed for in the complaint. While the plaintiff's complaint requested forty thousand seven hundred ninety four dollars ($40,794.00), his proof of claim sought forty four thousand seven hundred one dollars ($44,701.00) exclusive of interest and attorney fees. In violation of Rule 54(c), F.R.Civ.P., the judgment granted plaintiff the amount prayed for in his affidavit, erroneously awarding plaintiff almost four thousand dollars ($4,000.00) more than he was entitled to under his prayer for relief. This situation pro-

vides a perfect example of the gross inadequacy of a sworn proof of claim as a means of assessing damages upon default.

The decision of the Court of Appeals for the Fifth Circuit affirming without opinion the judgment of the district court is particularly surprising, because the Fifth Circuit has, in the past, required not only an evidentiary hearing on damages after default, when properly preserved, a jury trial on this unresolved issue has been required. Under prior Fifth Circuit decisions, it has been held that "a default is not treated as an absolute confession by the defendant of his liability and of the plaintiff's right to recover." *Nishimatsu Construction Co., Ltd.* v. *Houston National Bank* (5th Cir. 1975), 515 F.2d 1200, 1206. Where an action is brought upon an unliquidated sum, a judgment for damages may not be entered by the court without a trial by jury as guaranteed by the Seventh Amendment to the United States Constitution. *E. C. Gerhard Building Co.* v. *City of Dallas,* (5th Cir. 1924) 298 F. 264,268. Where, after default, an issue of fact remains to be determined, such as the award of a reasonable attorney fee, the issue should be submitted to a jury. *Thorpe* v. *National City Bank of Tampa,* (5th Cir. 1921), 274 F.200. As a result of the decision in this case by the Fifth Circuit, these rulings are apparently superseded. The decision rendered by the Court of Appeals for the Fifth Circuit in this case has created a very unclear and inconsistent policy with regard to the determination of unliquidated damages after default, and petitioners urge that this Court resolve this situation.

"When defendant contests the amount of the claim, a full hearing may be required on the issue of damages,

since a default does not concede the amount demanded. This proceeding is the same as any other trial except that it is limited to the question of damages." 10 Wright & Miller, *Federal Practice and Procedure* § 2688 at p. 284-5 (1973) (Citations omitted). "It has been held that upon the assessment of damages following the entry of a default, a defaulting defendant has the right to cross-examine plaintiff's witnesses and to introduce affirmative testimony on his own behalf in mitigation of the damages." Annot., "Defaulting Defendant's Right to Notice and Hearing as to Determination of Amount of Damages", 15 A.L.R. 3d 586,607 (1967).

Rule 37(b) sanctions, including the striking of pleadings and the entering of judgments by default are not uncommon throughout the federal court system. It is important that district court judges are provided proper guidance by this Court regarding the determination of damages upon the default of a defendant. In addition, many states have adopted a rule similar to Rule 37(b), and courts of those states will also benefit from a clear interpretation of this rule. Petitioners have been greatly prejudiced by the district court's failure to conduct an evidentiary hearing on the issue of damages, and they respectfully request the Court to grant certiorari on this issue.

2. The Decision of the Court of Appeals for the Fifth Circuit Conflicts With the Decisions of Other Circuits Regarding Whether an Individual Codefendant Is Entitled to a Trial Pursuant to Rule 54(b) Despite the Default of the Corporate Defendant

The complaint initiating this action involved three legal paragraphs. In Count I, the plaintiff sought commissions earned as a placement representative for

Continental Training Services, Inc. Count II sought payment upon a note executed by Continental Training in favor of the plaintiff, while Count III sought payment upon the same note by the personal guarantor, Gary Eyler.

All of the discovery conducted by the plaintiff involved Count I and was directed to Continental Training. No discovery and no court order was directed towards Gary Eyler. Yet, at the time that the district court granted the plaintiff's motion for sanctions for failure to make discovery, a default judgment was entered upon all three counts and against both defendants.

This ruling establishes a new precedent for the Court of Appeals for the Fifth Circuit. This precedent is in conflict with the precedents established in the Second and Fourth Circuits. *Davis* v. *National Mortgage Corp.* (2nd Cir. 1965), 349 F.2d 175; *Trans World Airlines, Inc.* v. *Hughes* (2nd Cir. 1971), 449 F.2d 51, *Rev'd on other grounds* (1973), 409 U.S. 363; *United States for the Use of Hudson* v. *Peerless Insurance Company* (4th Cir. 1967), 374 F.2d 942; *American Coat Pad Company of Baltimore City* v. *Phoenix Pad Company* (4th Cir. 1902), 113 F. 629.

This ruling by the Court of Appeals for the Fifth Circuit is also in conflict with Rule 54(b), F.R.Civ.P., which provides that a default order against one co-defendant does not terminate the action as to other claims and other parties. The rights of Gary Eyler were completely ignored by the district court. Pursuant to Rules 10(b) and 18, F.R.Civ.P., more than one claim may be included in a single cause of action and more than one party may be named as defendants.

However, individual entities must be treated separately by the court. "The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants." *Frow* v. *De La Vega* (1872), 15 Wall. (82 U.S.) 552, 21 L.Ed. 60,61.

> "Although *Frow* was a case of joint liability, we think the procedure established for multiple defendants by Rule 54(b) is strikingly similar and applicable not only to situations of joint liability but to those where the liability is joint and/or several. Such an interpretation finds some support in the common law: 'there may be entered an interlocutory judgment of default against the defaulting defendant, but a final judgment cannot be entered on the default until the issue as to the other defendants is successfully disposed of.' 49 C.J.S. Judgments § 191b(2), at 329 (1947)." *United States for the Use of Hudson* v. *Peerless Insurance Company* (4th Cir. 1967), 374 F.2d 942, 944-5.

While it is true that Gary Eyler is the President and a stockholder of the Continental Training Services, Inc., they remain separate legal entities. *American Coat Pad Company of Baltimore City* v. *Phoenix Pad Company* (4th Cir. 1902), 113 F. 629. The acts of the corporation are not to be imputed upon the individual officer or stockholder, especially where, as here, no discovery was directed towards Gary Eyler. Combining two claims in one cause of action as permitted for convenience under the Federal Rules of Civil Procedure does not dissolve the separate identities of the two claims or the parties. *Trans World Airlines, Inc.* v.

Hughes (2nd Cir. 1971), 449 F.2d 51, *Rev'd on other grounds* (1973), 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577.

The default entered by the district court properly related only to Count I of the complaint. Default should not have been entered against Continental Training in Count II, and there was no justification for the default order against Eyler in Count III.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

JOHN J. DILLON
RICHARD M. MALAD
DILLON HARDAMON & COHEN
120 E. Market St., Suite 511
Indianapolis, IN 46204
(317) 636-6481

Counsel for Petitioners

July 7, 1980

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 77-8085-Civ-CF

ANTHONY J. VENZARA, *Plaintiff*,

v.

CONTINENTAL TRAINING SERVICES, INC., and GARY EYLER,
Defendants.

ORDER

This cause came before the Court this date for calendar call. Pending before the Court was plaintiff's Motion for sanctions. The Court had deferred ruling on the plaintiff's Motion for sanctions at the pre-trial conference which was held on February 6, 1978.

A review of the file in this case reflects that on January 4, 1978, plaintiff filed a Motion to compel answers to interrogatories. Shortly thereafter, on January 17, 1978, the Court entered an Order requiring defendants to file supplemental answers to interrogatories, within 10 days thereafter. On January 30, 1978 defendants filed a Motion for extension of time and for continuance of the trial on grounds that the records pertaining to this action were "inadvertently destroyed by cleaning personnel", and it would take some time to attempt to "reconstruct" the records. The Court, on that same date, entered an Order denying defendants' Motion for extension of time and continuance, noting that defendants had failed to specify what documents had been destroyed, or how the documents were to be reconstructed.

At the pre-trial conference, the matter of the destroyed records was discussed at length. The Court indicated that, in a case such as this where records have been destroyed,

counsel should supply the Court with sworn affidavits of the parties involved, particularizing how documents had been destroyed, what documents had been destroyed and what effort the party is making to re-establish the papers in question. No such affidavits had been filed by the defendants at that time. As previously stated, the Court carried the Motion for sanctions with the case.

At the calendar call this date, the plaintiff again moved the Court for imposition of sanctions against the defendants for failure of the defendants to supply the Court and plaintiff with affidavits explaining the circumstances surrounding the destruction of the defendants' records, and verifying the allegations contained in defendants' motion for extension of time and continuance of the trial. Plaintiff questioned defendants' ability to answer interrogatories which appear to require reference to the allegedly destroyed records, while continuing to urge that all the records had been destroyed. Because of the destruction of the defendants' original records, the plaintiff is unable to verify the defendants' answers from records kept in the normal course of business. Defendants indicated that some of the destroyed records had been reconstructed and the originals of some of the records had been discovered in the possession of defendants' accountant. However, these few records were only produced by the defendants this date at the calendar call, and plaintiff had not had any opportunity to review them. This case is calendared for trial tomorrow.

The Court is now convinced that the defendants have deliberately disregarded the Court's instructions by failing to either supply the documents in question or sworn affidavits explaining and verifying their destruction or any valid effort towards their reconstruction. This deliberate inaction on the part of the defendants has totally frustrated plaintiff's efforts toward discovery. The complaint in this cause was filed March 15, 1977. The cause has been at issue since the filing of the defendants' answer and affirmative

defenses on July 18, 1977. On August 4, 1977, an Order was entered herein requiring the defendants to comply with the plaintiff's request for production of documents. The plaintiff has repeatedly unsuccessfully sought the production of documents and other discovery for a period of some ten months. Although the case was set for trial on March 14, 1978, with the plaintiff continuing to request production and the Court again ordering production, there has been no compliance by the defendant.

It is now impossible to begin the trial of the case tomorrow because the defendant has disregarded the Federal Rules of Civil Procedure and disobeyed the orders of this Court.

Plaintiff's motion for sanctions is granted. The defendants' answer and affirmative defenses are hereby stricken. Hereafter, the Court shall deal with this case as though a default had been entered against the defendants.

With respect to Count I, which is based on the failure of the defendants to pay plaintiff sums of money due under the contract, plaintiff shall promptly supply the Court with a statement under oath which shall specify the various items which the plaintiff has a right to recover under the contract, by itemizing each item and the amount claimed therefor. With regard to Count II, which is based on a promissory note executed by the defendant Continental in the principal sum of $10,000 plus interest, and with regard to Count III which is based on the personal guarantee by the defendant Eyler of the payment of said promissory note, plaintiff's sworn statement or statements shall specify the amount claimed to be due on the note and from the guarantor. The defendants shall, of course, be given credit for any and all interest payments upon the note but the defendants shall not be entitled to any credits or setoffs which may have been claimed by the answer and/or affirmative defenses which have now been stricken.

Plaintiff shall file the sworn proof of his claim with the Court, together with a proposed final judgment form, within twenty days hereafter. The defendants shall have ten days from the filing of plaintiff's sworn proof within which to fully and properly file a response thereto. This case is hereby stricken from this Court's trial calendar.

DONE and ORDERED at West Palm Beach, Florida, this 20th day of March, 1978, nunc pro tunc to March 13, 1978.

/s/ CHARLES B. FULTON
District Judge

cc: Bruce Zeidel, Esq.

William Norwich, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 77-8085-Civ-CF

ANTHONY J. VENZARA, *Plaintiff*,

v.

CONTINENTAL TRAINING SERVICES, INC., et al., *Defendants*.

FINAL JUDGMENT

The Court, on March 20, 1978, entered an Order granting the Plaintiff's Motion For Sanctions and striking Defendants' Answer and Affirmative Defenses as if a default judgment had been entered.

Pursuant to Court's Order of March 20, 1978, the Plaintiff has submitted a sworn Affidavit pertaining to Count I of the Complaint. The Affidavit shows that the Plaintiff is owed by Defendant, CONTINENTAL TRAINING SERVICES, INC., a net amount of $44,701.00 due under the contract. The Plaintiff was also entitled to attorney's fees arising as a result of the breach of the contract. Based upon the Affidavit submitted of the attorneys regarding a reasonable attorney's fee for services rendered in the case, the Court awards the Plaintiff attorney's fees against the Defendant, CONTINENTAL TRAINING SERVICES, INC., in the amount of $4,000, for a total judgment against CONTINENTAL TRAINING SERVICES, INC., of $48,701.00 all for which let execution issue forthwith.

Count II of the Complaint was an action based upon a promissory note. The value of the note was $10,000 at 24% interest from October 31, 1975. The Defendant, CONTINENTAL TRAINING SERVICES, INC., was the obligor on the note and the Defendant, GARY EYLER, was a guarantor of the note. The Defendants have submitted proof of payment of

$1,000 toward interest on the note. Therefore, after crediting the Defendants with payment, there remains a balance of principal and interest due on the note as of April 1, 1978, of $15,095.27. The note also provides for attorney's fees and based upon Affidavit submitted by Plaintiff, the Court awards the Plaintiff, $2,000 as attorney's fees. A total judgment for the Plaintiff on Count II and III of the Complaint is for $17,095.27 against CONTINENTAL TRAINING SERVICES, INC. and GARY EYLER.

In summary, the total judgment of the Plaintiff against the Defendant, CONTINENTAL TRAINING SERVICES, INC., for Counts I and II of the Complaint and attorney's fees is $65,796.27; the total judgment against GARY EYLER for Count III and attorney's fees is $17,095.27, all for which let execution issue.

DONE AND ORDERED at West Palm Beach, Florida, this 30 day of May, 1978.

/s/ CHARLES B. FULTON
District Judge

Copies Furnished Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-2586

ANTHONY J. VENZARA, *Plaintiff-Appellee*,

v.

CONTINENTAL TRAINING SERVICES, INC.,
and GARY EYLER, *Defendants-Appellants*.

Appeal from the United States District Court for the Southern District of Florida

(March 7, 1980)

Before TUTTLE, BROWN and TATE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

---

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

April 7, 1980

Gilbert F. Ganucheau
Clerk

To All Parties Listed Below:

No. 78-2586

Anthony J. Venzara

v.

Continental Training Services, Inc., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Gilbert F. Ganucheau, Clerk

By /s/ H. E. Adams, Jr.
Deputy Clerk

cc: Messrs. William Rosenbaum
Richard M. Malad

Messrs. Edward O. DeLaney
Michael R. Fruehwald

Supreme Court, U. S.
FILED
AUG 5 1980
MICHAEL RODAK, JR., CLERK

No. 80-24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTINENTAL TRAINING SERVICES, INC. AND GARY EYLER,

Petitioners,

vs.

ANTHONY J. VENZARA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JAMES A. STRAIN
EDWARD O. DELANEY
JAMES E. MAHONEY
BARNES, HICKAM, PANTZER & BOYD
1313 Merchants Bank Building
Indianapolis, Indiana 46204
Telephone: (312) 638-1313
Counsel for Respondent

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

QUESTIONS PRESENTED.

1. Whether the Court of Appeals properly affirmed the trial court's exercise of discretion in basing an assessment of damages upon affidavits submitted by the plaintiff when petitioners were defaulted for failing to provide discovery related to damages and had neither submitted opposing evidence nor requested a hearing on the issue of damages.

2. Whether the Court of Appeals properly affirmed the trial court's exercise of discretion in holding the guarantor of a promissory note bound by a default judgment against the principal where the guarantor controlled the litigation on behalf of the principal, admitted he was guarantor, and admitted that no payments had been made upon the note.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Statement of the Case	1
Summary of Argument	5
Argument	5
1. The Trial Court Properly Based Its Assessment of Damages Upon Affidavits Submitted by Venzara	5
2. The Guarantor of a Promissory Note Is Bound by a Default Judgment Against the Principal Debtor If the Guarantor Controls the Litigation on Behalf of the Principal	11
3. The Unpublished Decision of the Fifth Circuit Would Create No Conflict of Authority Even If It Were Contrary to Rulings of Other Courts	12
Conclusion	13

CITATIONS

Cases

Alleghany Corp. v. Romco, Inc., 392 F. Supp. 38 (W. D. Pa. 1975) 11

Barber v. Turberville, 218 F. 2d 34 (D. C. Cir. 1954) ... 7

Cundiff v. Washburn, 393 F. 2d 505 (7th Cir. 1968) 6

E. C. Gerhard Bldg. Co. v. City of Dallas, 298 F. 264 (5th Cir. 1924) 7

Eisler v. Stritzler, 535 F. 2d 148 (1st Cir. 1976) 8

Flaks v. Koegel, 504 F. 2d 702 (2d Cir. 1974) 9, 10

Geddes v. United Financial Group, 559 F. 2d 557 (9th Cir. 1977) 7

Hartford Accident & Indemnity Co. v. Bank of Commerce, 170 F. 2d 94 (5th Cir. 1948) 6

Interlake, Inc. v. Erie Industrial Trucks, Inc., 427 F. Supp. 1012 (W. D. Pa. 1977) 11

Klapprott v. United States, 335 U. S. 601 (1949) 7

Monogram Models, Inc. v. Industro Motive Corp., 492 F. 2d 1281 (6th Cir.), *cert. denied,* 419 U. S. 843 (1974) 6

Peitzman v. City of Illmo, 141 F. 2d 956 (8th Cir.) *cert.* denied, 323 U. S. 718 (1944) 7

Safeway Stores, Inc. v. Dial, 371 F. 2d 595 (5th Cir. 1963) 6

Thomson v. Wooster, 114 U. S. 104 (1885) 7

Thorpe v. City National Bank, 274 F. 200 (5th Cir. 1921) 7

Trans World Airlines, Inc. v. Hughes, 449 F. 2d 51 (2d Cir. 1971), *rev'd*, 409 U. S. 363 (1973) 10

Walter Heller & Co. v. Cox, 343 F. Supp. 519 (S. D. N. Y. 1972), *aff'd mem.*, 486 F. 2d 1398 (2d Cir.), *cert. denied*, 414 U. S. 827 (1973) 12

Other Authorities

Rule 17, Rules of United States Supreme Court 13

Rule 21, Local Rules of United States Court of Appeals for the Fifth Circuit 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONTINENTAL TRAINING SERVICES, INC.
AND GARY EYLER,

Petitioners,

vs.

ANTHONY J. VENZARA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION.

STATEMENT OF THE CASE.

Anthony J. Venzara ("Venzara") filed suit against Continental Training Services, Inc. ("Continental") and its president, Gary Eyler ("Eyler"), alleging that Continental had breached an agency contract with Venzara and that neither Continental nor Eyler had paid upon a promissory note for which Continental was the principal debtor and Eyler was the guarantor. (Tr. 1-3). Continental admitted that it had entered into an agency contract with Venzara and that it had executed a promissory note in favor of Venzara. (Tr. 19). Continental also claimed, as an affirmative defense, that it was entitled to a setoff of $17,908.80 against Venzara, for contractual payments which Venzara allegedly had retained improperly. (Tr. 20). Eyler ad-

mitted that he was guarantor of the note and that neither he nor Continental had paid upon the Note. (Tr. 34).

Venzara served two sets of interrogatories upon Continental. (Tr. 41, 64). Continental's responses to these interrogatories were signed by Eyler, who stated explicitly that he was answering both in his individual capacity and on behalf of Continental. (Tr. 85, 121-128). Venzara found that the answers to some of the interrogatories dealing with his damages and Continental's alleged setoff were unresponsive and moved for an order compelling supplementary answers. (Tr. 62). The court granted Venzara's motion, stating, "[D]efendant's answers are unclear and unresponsive to the questions posed." (Tr. 69).

After the court granted Venzara's motion to compel, both petitioners moved for additional time to comply with the order, asserting that "subsequent to the filing original answers to interrogatories, all records pertaining to the above-captioned cause that were in the custody of the defendants were inadvertently destroyed by cleaning personnel in defendant's offices." (Tr. 73). In response to this motion, the court stated:

> A review of the Motion and the interrogatories to which it was directed disclosed that the defendants had either misread the original interrogatories, or deliberately responded with incomplete and/or evasive answers. Today, January 30, 1978, the defendants have filed a motion seeking delay in the trial on the ground that certain material in defendants' office was inadvertently destroyed by the janitorial service. Without particularizing the specific papers that were destroyed, the defendants simply categorize the papers as "all records pertaining to the above cause of action." Without specifying when or how the lost papers will be re-established, the defendants simply advise that an effort is being made to reconstruct them.

(Tr. 75). The court ordered the parties to confer and then to confer jointly with the court, emphasizing, "This cause is set for, and will be tried on, March 14, 1978 with a pre-trial conference on February 6, 1978." (Tr. 75).

On February 2, 1978, the parties submitted their Joint Pre-Trial Stipulation. (Tr. 80). The parties stipulated to the authenticity of the contract and the promissory note (Tr. 81). The parties also entered into the following stipulation:

> VII. *Issues of Fact To Be Litigated*
>
> A. The amount due the Plaintiff pursuant to the contract between the parties
>
> B. The amount due the Plaintiff on the promissory note
>
> C. The amount Defendant is entitled to as a setoff against the amount found to be due Plaintiff.

(Tr. 81).

On the day before the trial was to begin, Continental had neither complied with the court's order to supplement its answers to interrogatories, nor substantiated its claim that necessary documents had been destroyed. The court entered an unpublished order defaulting the petitioners and striking their answers and affirmative defenses. (Tr. 90-92). The court found:

> [T]he defendants have deliberately disregarded the Court's instructions by failing to either supply the documents in question or sworn affidavits explaining and verifying their destruction or any valid effort towards their reconstruction. This deliberate inaction on the part of the defendants has totally frustrated plaintiff's efforts toward discovery.

(Tr. 91).

The order specified the following procedure for assessing damages:

> Plaintiff shall file the sworn proof of his claim with the Court, together with a proposed final judgment form, within twenty days hereafter. The defendants shall have ten days from the filing of plaintiff's sworn proof within which to fully and properly file a response thereto.

(Tr. 92).

Pursuant to the court's order, Venzara filed affidavits to support his claim for damages. (Tr. 103-114). In response, Continental filed no opposing evidence and requested a hearing only on the issue of attorney's fees. (Tr. 101-102). The court entered an unpublished final judgment in favor of Venzara, basing its assessment of damages upon Venzara's affidavits. (Tr. 115-116). Judgment was entered against Continental for $48,701.00 on the agency contract and against both Continental and Eyler for $17,095.27 on the promissory note. (Tr. 115-116).

Petitioners appealed from the judgment. After hearing oral argument, the Fifth Circuit affirmed the judgment without opinion pursuant to Local Rule 21.[1]

---

1. Rule 21 of the Local Rules for the United States Court of Appeals for the Fifth Circuit provides:

> When the Court determines that any one or more of the [specified] circumstances exist and is dispositive of the matter submitted to the court for decision . . . and the Court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

SUMMARY OF ARGUMENT.

Neither the Federal Rules of Civil Procedure nor the authorities cited by petitioners preclude assessment of damages against a defaulted defendant based upon affidavits. By failing to submit opposing affidavits and failing to request a hearing on the amount of damages due on the contract, Continental waived the right to claim that the procedure used was erroneous. Because the only factual issue to be litigated was the amount of damages, the procedure used to assess damages after petitioners were defaulted for failing to provide discovery on damages was proper. Therefore, this is an inappropriate case for establishing general procedural requirements for assessing damages in default cases.

The general rule that an individual defendant is entitled to a trial despite the default of a corporate defendant is inapplicable when the individual defendant controls the litigation on behalf of the corporate defendant and is liable only as guarantor of a corporate obligation. This exception to the general rule is consistent with existing authority. The question raised by this situation is not sufficiently important to justify review by this Court.

The Fifth Circuit's affirmance of the district court's unpublished order without opinion creates no precedent and would produce no conflict of authority even if it were contrary to the rulings of other courts.

ARGUMENT.

1. The Trial Court Properly Based Its Assessment of Damages Upon Affidavits Submitted by Venzara.

Petitioners were defaulted and Continental's affirmative defense of setoff was stricken because of Continental's failure to provide discovery on the issues of damages and setoff. The court

ordered Venzara to file a sworn proof of his claims and provided petitioners with an opportunity to file a full response. (Tr. 92). Despite this opportunity, petitioners submitted no opposing evidence and requested a hearing only on the issue of attorney's fees. (Tr. 101-102). To preserve alleged error a party must "make known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor." Rule 46, Fed. R. Civ. P. By failing to do this petitioners waived any purported impropriety in the court's action. *Cundiff* v. *Washburn,* 393 F. 2d 505 (7th Cir. 1968); *Safeway Stores Inc.* v. *Dial,* 311 F. 2d 595 (5th Cir. 1963); *Hartford Accident & Indemnity Co.* v. *Bank of Commerce,* 170 F. 2d 94 (5th Cir. 1948). Despite this waiver, Petitioners now assert that the procedure used by the court contravened existing authority and that they were entitled to a hearing on the issue of damages.

Monogram Models, Inc. v. *Industro Motive Corp.,* 492 F. 2d 1281 (6th Cir.), *cert. denied,* 419 U. S. 843 (1974) supports the procedure used by the trial court in this case. In *Monogram Models* the defendant failed to answer interrogatories pertaining to damages and was defaulted on the issue of damages. The trial court awarded the plaintiff $25,000.00 in lieu of actual damages. The Sixth Circuit affirmed, stating:

> Industro cannot prevent Monogram from ascertaining the facts with regard to damages by remaining silent and failing to answer interrogatories duly submitted to it, and then assert that it has been denied due process when sanctions for such refusal to answer are imposed as outlined in the Federal Rules of Civil Procedure. The District Court did not err in defaulting Industro on the issue of damages.

492 F. 2d at 1287-1288.

The trial court in the present case was more lenient than was the trial court in *Monogram Models.* The parties stipulated that the only issues of fact to be litigated were the amount of dam-

ages to which Venzara was entitled and the amount of setoff to which Continental was entitled. (Tr. 81). Even after striking the affirmative defense of setoff and defaulting petitioners for failure to provide discovery on damages and setoff, the court provided the petitioners with an opportunity to submit evidence in opposition to Venzara's affidavits. Although they failed to do this, and they requested a hearing only on the issue of attorney's fees, petitioners contend that the court erred by failing to conduct a hearing on all damages. Neither sound reasoning, nor the authority cited by the petitioners, supports this contention.

Even if the cases cited by petitioners supported the general proposition that a hearing on damages is required after default, they would be inapplicable to this case because they did not involve defaults for failure to provide discovery related to damages. *See Klapprott* v. *United States,* 335 U. S. 601 (1949) (defendant defaulted for failure to answer charges in proceeding to revoke citizenship); *Thomson* v. *Wooster,* 114 U. S. 104 (1885) (*pro confesso* decree entered after defendant failed to answer complaint); *Peitzman* v. *City of Illmo,* 141 F. 2d 956 (8th Cir.), *cert. denied* 323 U. S. 718 (1944) (defendants defaulted for failing to submit to depositions); *Geddes* v. *United Financial Group,* 559 F. 2d 557 (9th Cir. 1977) (defendants defaulted for failing to plead or otherwise defend); *Barber* v. *Turberville,* 218 F. 2d 34 (D. C. Cir. 1954) (default judgment set aside for excusable neglect in answering complaint; jury trial required on remand); *Thorpe* v. *City National Bank,* 274 F. 200 (5th Cir. 1921) (defendant defaulted for failing to plead or otherwise defend). One case cited by petitioners in alleged support of their contention did not involve a default judgment at all. *E. C. Gerhard Bldg. Co.* v. *City of Dallas,* 298 F. 264 (5th Cir. 1924).

Furthermore, the cases cited by the petitioners do not establish the proposition for which they are cited. None of these

cases held that it is improper to base an assessment of compensatory damages upon affidavits in a default case.

In only two cases cited by petitioners were judgments reversed because hearings were not conducted on the issue of damages. Neither of these cases presents a conflict with action taken by the Fifth Circuit in the instant case.

In *Eisler* v. *Stritzler*, 535 F. 2d 148 (1st Cir. 1976), the trial court defaulted the defendant and entered judgment for the full amount requested in the plaintiff's complaint. Because the record did not show that the trial court considered any evidence on the amount of damages, the First Circuit reversed, stating,

> Although the default judgment was proper, it would not have been correct to assess damages without a hearing. . . . The default judgment on the well-pleaded allegations in plaintiffs' complaint established only defendants' liability. It was incumbent upon plaintiffs to establish the extent of the damages resulting from defendant's violations. *See TWA* v. *Hughes, supra*, 449 F. 2d at 69-70; *Caribbean Produce Exchange* v. *Caribe Hudson Trailer, Inc.*, 65 F. R. D. 46 (D. P. R. 1974).

535 F. 2d at 153-154.

In *Eisler*, the defendant was defaulted for refusing to submit to a deposition. There is no indication that the discovery which was withheld was necessary to ascertain damages. Therefore, any requirement for a hearing in a case such as *Eisler* would be inapplicable to the present case, in which liability was not at issue, and the parties stipulated that the only fact issues to be litigated related to the amount of damages. Moreover, the propriety of alternative procedures, such as use of affidavits, to assess damages was not before the *Eisler* court. Therefore, *Eisler* does not support the proposition that a hearing is required in every case in which damages are awarded after a default judgment. This is demonstrated by the cases relied upon by the court in the quotation above. Although a hearing was

conducted in each of these cases, neither case dealt with the propriety of alternative procedures, and, therefore, neither held that a hearing was required.

In *Flaks* v. *Koegel,* 504 F. 2d 702 (2d Cir. 1974), the plaintiffs sought both compensatory and punitive damages, based on alleged securities fraud. After defaulting the defendant for failing to anwser interrogatories and failing to attend a deposition, the trial court entered judgment for the full amount sought in the complaint, including $400,000.00 in punitive damages. Holding that punitive damages should not have been assessed without an evidentiary hearing, the Second Circuit reversed, stating:

> While punitive damages are recoverable, it is evident that their amount cannot be fixed without an evidentiary hearing. An award of punitive damages is not a matter of right but is within the discretion of the trier of the facts and will depend upon the degree of wanton and willful conduct of the defendant. . . . But here there has been no trial of the facts and therefore no basis for determining how egregious or opprobrious that conduct has been. . . . Punitive damages are clearly not liquidated *or computable* and there is no basis at all here to award the amount set forth in the complaint.

504 F. 2d at 707 (emphasis added).

The court distinguished between punitive damages and damages which are susceptible of calculation. With respect to the plaintiffs' claims for rescission of certain securties transactions, the court observed, "The determination of the amount paid by the plaintiffs for the securities is easily made and presents none of the difficulties provoked by the punitive damage claim herein discussed." 504 F. 2d at 707.

Clearly, *Flaks* does not support the contention that assessment of compensatory damages without a hearing was improper in the present case. Damages on the promissory note obviously were liquidated. Furthermore, the contract in dispute in this

case provides formulae for determining the amounts payable to Venzara. (Tr. 7-8). Thus, as in *Flaks*, calculation of damages on this contract "is easily made and presents none of the difficulties provoked by the punitive damages question. . . ." 504 F. 2d at 707.

In *Trans World Airlines, Inc.* v. *Hughes*, 449 F. 2d 51 (2d Cir. 1971), *rev'd*, 409 U. S. 363 (1973), the trial court defaulted the defendants for failing to provide discovery and then referred the case to a special master for hearings on damages. The Second Circuit affirmed a judgment based on the master's findings, but did not address the question whether alternative procedures for determining damages would have been appropriate. Therefore, Hughes does not support the general proposition that a hearing on damages is required after default.

Even if *Hughes* had held that a hearing was required under the circumstances of that case, that holding would not control the instant case. Assessment of damages in *Hughes* involved complex isses of causation which are not present in the instant case. Moreover, the amount of damages was not computable from contractual formulae, as were the damages in the case at bar.

The hearings conducted in *Hughes* "extended over a period of two years, consisting of hundreds of hours of testimony and producing a transcript of 11,000 pages." 449 F. 2d at 72. *Hughes* was a complex antitrust case, in which the hearings addressed the question of proof of causation extensively because, "The default judgment did not give TWA a blank check to recover from Toolco any losses it had ever suffered from whatever source. " 449 F. 2d at 70. The issue of the amount of damages was vastly complex, involving expert calculations on the projected market for a fleet of aircraft which Trans World Airlines did not obtain and the losses suffered due to decreased fleet size. The final judgment was for $145,448,171.07. Obviously, any requirement for a hearing in a case such as *Hughes*

would be inapplicable to the present case, in which causation is not at issue and in which damages are based upon a contract and a promissory note, each of which provides the method for calculating the amount due.

The scarcity of reported decisions addressing the question whether a court may assess compensatory damages against a defaulted defendant by considering unchallenged sworn evidence without conducting a formal hearing indicates that the question does not arise often and is not sufficiently important to justify review by this Court. The peculiar facts involved make this an inappropriate case for establishing general procedural standards for assessing damages in a default case. Petitioners did not submit, nor did they even offer to submit, any evidence in opposition to the affidavits submitted by Venzara. The judgment in this case was the practical equivalent of summary judgment on the issue of damages, which is appropriate when conflicting evidence is not presented. *Interlake, Inc.* v. *Erie Industrial Trucks, Inc.*, 427 F. Supp. 1012 (W. D. Pa. 1977); *Alleghany Corp.* v. *Romco, Inc.*, 392 F. Supp. 38 (W. D. Pa. 1975). If a hearing had taken place, the only evidence presented would have been that submitted by Venzara. Therefore, the petitioners could not have been prejudiced by the trial court's failure to conduct a formal hearing, and this is not an appropriate case to raise the question whether a hearing may be required in a case in which conflicting evidence is presented.

2. The Guarantor of a Promissory Note Is Bound by a Default Judgment Against the Principal Debtor if the Guarantor Controls the Litigation on Behalf of the Principal.

Petitioners correctly assert that, as a general rule, an individual defendant is entitled to a trial despite the default of a corporate defendant. From that general proposition, they leap to the conclusion that, under the circumstances of the case at bar, a default against Eyler was inappropriate. The general rule

is simply inapplicable to the facts of this case. Eyler was a defendant in his individual capacity only as guarantor of a promissory note from Continental to Venzara. Eyler admitted that he was guarantor of the note and that neither he nor Continental had paid upon the note. (Tr. 34). Eyler was held liable only on the note. Petitioners have raised no question as to the propriety of the default judgment against Continental on the note.

Eyler controlled the litigation on behalf of Continental and signed the interrogatory answers which the court found to be unresponsive. (Tr. 123). Therefore, Eyler cannot claim that he was prejudiced by the misbehavior of another party over whom he had no control. Once the liability of Continental was established, no issues remained for Eyler to contest, and, entry of a default judgment against Eyler was proper. *Cf., Walter Heller & Co.* v. *Cox,* 343 F. Supp. 519 (S. D. N. Y. 1972), *aff'd mem.,* 486 F. 2d 1398 (2nd Cir.), *cert. denied,* 414 U. S. 827 (1973) (under principles of res judicata, individual guarantor who was president of corporate debtor and controlled litigation on its behalf bound by judgment against corporate debtor).

The appropriateness of a default judgment against an individual defendant under the peculiar circumstances of this case is an issue which apparently does not arise often. The need for guidance from the Supreme Court on this issue is not great, and, therefore, the question is not sufficiently important to merit review by this Court.

3. The Unpublished Decision of the Fifth Circuit Would Create No Conflict of Authority Even if It Were Contrary to Rulings of Other Courts.

Neither the order of the trial court nor the final judgment based on that order was published. The Fifth Circuit affirmed the trial court's judgment without opinion pursuant to a local rule which applies when the court determines that an opinion

would have no precedential value. Obviously, the affirmance of an unpublished order without opinion creates no precedent on any issue. The Fifth Circuit's decision would create no conflict of authority even if it were contrary to the rulings of other courts. The considerations established by Rule 17 of this court demonstrate that this is not an appropriate case for review on certiorari.

CONCLUSION.

The decision of the Fifth Circuit in this case is consistent with existing authority. Petitioners have waived any improprety in the trial court's action. The decision in this case created no precedent, and therefore would create no conflict of authorities even if it were contrary to the rulings of other courts. The questions presented are not sufficiently important to merit review by this Court. This Court should not issue a writ of certiorari to the Fifth Circuit to review this case.

Respectfully submitted,

JAMES A. STRAIN
EDWARD O. DELANEY
JAMES E. MAHONEY
BARNES, HICKAM, PANZER & BOYD
1313 Merchants Bank Building
Indianapolis, Indiana 46204
Telephone: (312) 638-1313
Counsel for Respondent